Kemacahaya Development Sdn Bhd v Pywatec (M) Sdn Bhd & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(A)-1726–09 OF 2021 AND B-02(A)-1727–09 OF 2021
HAS ZANAH MEHAT, CHE MOHD RUZIMA AND SEE MEE CHUN JJCA
2 AUGUST 2022

Companies and Corporations — Liquidator — Duties — Common liquidator for wound-up developer and wound-up owner of land on which properties had been built refused to consent to agreement for sub-sale of the properties — As condition for giving of consent, liquidator required seller of properties to prove it had fully paid up purchase price for the properties — Whether liquidator's stand was not unreasonable or absurd or an error of law — Whether liquidator had duty and power to ensure all documentation in relation to properties in question were in order before consent was given — Whether liquidator could undertake verification exercise and call for historical documentation to establish ownership of the properties — Whether mere proof of payment of quit rent, assessment and connection of utilities, without more, was insufficient to support claim to beneficial or legal ownership of the properties

The two appeals herein, which emanated from the same decision of the High Court, were only between the respective appellants and the common second respondent ('Asiamet'). The appellant in Appeal 1726 was a developer whilst the appellant in Appeal 1727 was the proprietor of the land on which the developer had carried out mixed housing and commercial development. The appellants and another company called 'Megatalent' were all related and shared the same directors and shareholders. Both the appellants were wound up by order of court and were represented in the proceedings by a common liquidator. The common issue in both appeals concerned 81 units of properties that Asiamet had bought in the developer's project. They comprised six units of shop-lots that Asiamet had bought directly from the appellants, 51 properties that were initially 'bought' by Megatalent from the appellants and subsequently sold to Asiamet, seven properties which were initially bought by individuals related to the appellants and Megatalent and later sold to Asiamet and 17 units which were initially bought by individuals unrelated to the appellants and later sold to Asiamet. The liquidators discovered from their investigations that RM17,918,554 out of the total purchase price for the 81 units remained unpaid to the appellants. When Asiamet contracted to sell the 81 units to a company ('Ascent') for RM35m and a clause in the agreement required Asiamet to obtain the written consent/approval of the appellants to the sale, transfer and assignment of the properties to Ascent within a stipulated

time-frame, the liquidator refused to give the requisite consent/undertaking because Asiamet was not able to prove that the full purchase price for all the units had been paid. The High Court granted Asiamet an order to reverse the liquidator's decision and require him to provide the relevant consent/endorsement. The court took the view that the previous consents/undertakings given by the appellants in the deeds of assignments and/or sale and purchase agreements either as between the appellants and Asiamet or as between the first purchasers of the properties and Asiamet were sufficient to evidence the transfer of the beneficial interest in the properties to Asiamet. In the instant appeal, the appellants argued that the consent/undertakings previously given by the appellants were not evidence of whether the full purchase prices of the properties had been paid, nor were they sufficient to determine if Asiamet was the beneficial owner of the properties. The liquidators said they were duty-bound to ensure that all documents were in order before they gave their consent.

Held, unanimously allowing the appeals and setting aside the decision of the High Court:

(1) The liquidator's refusal to consent to the sale of the 81 units to Ascent was not a decision that was unreasonable or absurd or in error of law. The High Court judge erred in fact and in law when he did not consider whether the liquidator's decision was reasonable or absurd but had instead substituted his own finding by ruling that he found Asiamet was a bona fide purchaser for value of the 81 properties (see paras 34 & 71).

(2) With regard to the 75 units which Asiamet bought from the previous purchasers, the documentation related to those transactions was insufficient to prove Asiamet's beneficial or legal ownership of those properties as it had not proven that the full purchase price or the 10% deposit or, in the loan cases, the differential amount, had been paid. In 58 out of the 75 units, the transactions were between interested parties, ie, the common directors and shareholders, whilst in the case of the remaining 17 units, there were instances where the loan amount did not match the purchase price. Due to the nature of the many 'related transactions' and the manner in which the acquisition and disposal of the properties were carried out, the liquidator's action in requiring more than the documents already provided was reasonable and was not absurd or an error in law. As regards the six units that Asiamet had bought directly from the appellants, given that the Court of Appeal in a separate suit had not recognised Asiamet's beneficial ownership in those properties, those six units were also subject to the same requirement of proof of payment of the purchase price (see paras 45–50 & 56).

(3) The liquidator had power to investigate and ascertain whether the acts of the directors of the appellants were correct and proper. This was more so

where fraud, collusion or miscarriage of justice was involved as the liquidator was a trustee in bankruptcy for the creditors. The liquidator could investigate, as was done here, by a verification process and call for historical documentation to establish ownership of the properties (see paras 64–67).

(4) Mere proof of payment of quit rent and assessment and payment for connection of water supply, without more, could not support a claim to beneficial and legal ownership of the properties in question (see para 69).

[Bahasa Malaysia summary

Dua rayuan disini yang bermula daripada keputusan yang sama dari Mahkamah Tinggi, adalah antara perayu dan responden kedua yang sama (Asiamet). Perayu dalam Rayuan 1726 merupakan seorang pemaju manakala perayu dalam Rayuan 1727 merupakan tuan milik tanah yang mana pemaju telah menjalankan pembangunan bercampur perumahan dan komersil. Perayu dan satu lagi syarikat 'Megatalent' semuanya berkaitan dan berkongsi pengarah dan pemegang saham yang sama. Kedua-dua perayu telah digulungkan melalui satu perintah mahkamah dan diwakili dalam prosiding tersebut melalui seorang penyelesai yang sama. Isu umum dalam kedua-dua rayuan berkaitan dengan 81 hartanah yang Asiamet telah beli dalam projek pemaju. Ianya terdiri daripada enam unit lot kedai yang Asiamet telah membeli secara terus daripada perayu, 51 hartanah yang pada mulanya dibeli oleh Megatalent daripada perayu dan kemudiannya telah jual kepada Asiamet, tujuh hartanah yang pada mulanya dibeli oleh individu yang berkait dengan perayu dan Megatalent dan kemudiannya dijual kepada Asiamet dan 17 unit yang pada mulanya dibeli oleh individu yang tidak berkait dengan perayu dan kemudiannya telah dijual kepada Asiamet. Penyelesai mendapati daripada siasatan mereka bahawa RM17,918,554 daripada jumlah harga jualan untuk 81 unit masih tidak dibayar kepada perayu. Apabila Asiamet diberi kontrak untuk menjual 81 unit kepada satu syarikat (Ascent) untuk RM35 jutadan satu klausa dalam perjanjian yang memerlukan Asiamet untuk mendapatkan izin/kelulusan bertulis perayu untuk menjual, memindahkan, dan penyerahhakkan hartanah tersebut kepada Ascent dalam satu tempoh masa yang ditetapkan, penyelesai enggan untuk memberikan izin/aku janji kerana Asiamet tidak dapat membuktikan bahawa harga jualan penuh untuk kesemua unit telah dibayar. Mahkamah Tinggi membenarkan Asiamet satu perintah untuk menerbalikkan keputusan penyelesai dan memerlukannya untuk menyediakan izin/pengendorsan yang berkaitan. Mahkamah mengambil pandangan bahawa izin/aku janji yang sebelum in yang diberikan oleh perayu dalam suratikatan penyerahhakkan dan/atau perjanjian jual beli sama ada antara perayu dan Asiamet atau antara pembeli pertama hartanah tersebut dan Asiamet adalah memadai untuk membuktikan pemindahan kepentingan benefisial dalam hartanah tersebut kepada Asiamet. Dalam rayuan ini, perayu berhujah bahawa izin/aku janji yang sebelum ini diberikan oleh perayu bukan keterangan sama

ada harga pembelian penuh hartanah tersebut telah dibayar, dan ianya juga tidak memadai untuk menentukan sama ada Asiamet merupakan pemilik benefisial hartanah tersebut. Penyelesai menyatakan bahawa mereka mempunyai tanggungjawab untuk memastikan semua dokumen adalah teratur sebelum mereka memberikan izin mereka.

Diputuskan, sebulat suara membenarkan rayuan dan mengenepikan keputusan Mahkamah Tinggi:

(1) Keengganan penyelesai untuk memberi izin kepada penjualan 81 unit kepada Ascent bukanlah satu keputusan yang tidak munasabah atau tidak masuk akal, atau khilaf disisi undang-undang. Mahkamah Tinggi khilaf dalam fakta dan undang-undang apabila ianya tidak mengambil kira sama ada keputusan penyelesai adalah munasabah atau tidak masuk akal akan tetapi menggantikan dapatannya sendiri dengan memutuskan bahawa dia mendapati bahawa Asiamet merupakan seorang pembeli bona fide untuk nilai kesemua 81 hartanah (lihat perenggan 34 & 71).

(2) Berkaitan dengan 75 unit yang mana Asiamet telah membeli daripada pembeli terdahulu, dokumentasi berkaitan dengan transaksi tersebut adalah tidak memadai untuk membuktikan milikan Asiamet di sisi undang-undang atau benefisial terhadap hartanah tersebut masih belum dibuktikan bahawa harga pembelian penuh atau 10% deposit, atau dalam kes berkaitan pinjaman, jumlah yang selebihnya, telah dibayar. Dalam 58 daripada 75 unit, transaksi adalah diantara pihak berkepentingan, iaitu, pengarah dan pemilik saham yang sama, manakala dalam kes 17 unit yang selebihnya, wujud keadaan di mana jumlah pinjaman tidak sepadan dengan harga pembelian. Atas sebab sifat banyak transaksi yang berkait dan cara yang mana pemilikan dan pelupusan hartanah tersebut dijalankan, tindakan penyelesai dalam memerlukan lebih daripada dokumen yang dikemukakan adalah munasabah dan tidak luar biasa dan tidak khilaf disisi undang-undang. Berkaitan dengan enam unit yang Asiamet telah beli secara terus daripada perayu, mengambila kira Mahkamah Rayuan telah dalam guaman yang berbeza tidak mengiktiraf milikan benefisial Asiamet dalam hartanah tersebut, enam unit tersebut juga tertakluk kepada keperluan bukti pembayaran yang sama untuk harga pembelian (lihat perenggan 45–50 & 56).

(3) Penyelesai mempunyai kuasa untuk menyiasat dan menentukan sama ada pelakuan pengarah perayu adalah betul dan teratur. Terutama sekali apabila, frod, pakatan sulit, atau kegagalan keadilan adalah terlibat kerana penyelesai adalah pemegang amanah dalam kebankrapan kepada pemiutang. Penyelesai boleh menyiasat, sepertimana yang telah dilakukan disini, melalui proses verifikasi dan memohon dokumen untuk menentukan pemilikan hartanah tersebut (lihat perenggan 64 & 67)

A (4) Pembuktian penbayaran cukai tanah, taksiran dan penbayaran untuk penyambungan untuk air, tanpa apa-apa yang lain tidak boleh menyokong tuntutan kepada pemilikan benefisal atau disisi undang-undang hartanah yang dipersoalkan (lihat perenggan 69)]

B **Cases referred to**

Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor [2007] 3 MLJ 571; [2007] 7 CLJ 516, HC (refd)

Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor [2007] 2 MLJ 12, CA (refd)

C *Angkutera Sdn Bhd v Jurimba Sdn Bhd & Anor* [2016] 5 MLJ 242, CA (refd)

CIMB Islamic Bank Bhd v Khairuddin bin Abu Hassan [2021] 2 MLJ 155; [2021] 4 CLJ 375, CA (distd)

Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 ML J 204, CA (refd)

D *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201, FC (refd)

Labracon Pty Limited v Cutrich & Anor [2013] NSWSC 97, SC (refd)

Menastar Finance Ltd (in liq), Menastar Ltd v Simon, Re [2003] 1 BCLC 338 (refd)

E *North Malaya Engineers Trading Co Sdn Bhd v Aik Aik Holdings* [2014] 4 CLJ 629, HC (refd)

Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713, FC (refd)

Pasupathy a/l Kanagasaby v Masterskill (M) Sdn Bhd & Anor and another appeal [2017] MLJU 129; [2017] 1 LNS 106, CA (refd)

F *Shruth Ltd; International Brands USA Inc v Goldstein and another; International Brands USA Inc and another v Haswell and others, Re* [2006] 1 BCLC 294, ChD (refd)

Tee Siew Kai (liquidators for Merger Acceptance Sdn Bhd (in liquidation)) v Machang Indah Development Sdn Bhd (in liquidation) (previously known as Rakyat Corp Sdn Bhd) [2020] 6 MLJ 168; [2020] 4 CLJ 841, FC (refd)

G *Tetuan Tokoyaki Property Sdn Bhd v Sam Kok Sang & Tham Sow Seng & Ors* [2001] 1 MLJ 585; [2001] 4 CLJ 97, HC (refd)

Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor [2013] 2 MLJ 629, FC (folld)

H

Legislation referred to

Civil Law Act 1956 s 4(3)

Companies Act 1965 (repealed by Companies Act 2016) s 279

Local Government Act 1976 ss 127, 163(1)

I

Gopal Sri Ram (with Ong Teng Kek, Gabriel Daniel, Austen Emmanuel Pereira and Melissa Chan Shyuk Wern) (Paul Ong & Assoc) in Civil Appeal Nos B-02(A)-1726–09 of 2021 and B-02(A)-1727–09 of 2021 for the appellant.

Benjamin Dawson (with Rajes Raghavji Patel, Eileen Othman, Roeshan Gomez and Kresha Paskaren) (Rajes Hisham Rahim & Gopal) in Civil Appeal Nos B-02(A)-1726–09 of 2021 and B-02(A)-1727–09 of 2021 for the second respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals heard before the court. Documents and issues involved are the same and both appeals emanate from the decision of the High Court judge ('HCJ') made on 1 September 2021.

[2] Appeal 1726 is the appeal by the liquidator of Kemacahaya Development Sdn Bhd ('developer'). Appeal 1727 is the appeal by the liquidator of Sykt Kemacahaya Sdn Bhd ('proprietor'). The respondent here is the second respondent as both the first respondents in the appeals were removed as parties. They were the petitioners in the winding up.

[3] Parties have prepared one set of submissions and relied on the documents filed in Appeal 1726.

[4] We allowed both appeals and give our reasons as follows.

BACKGROUND FACTS

[5] The developer was the developer of a mixed development project held under a freehold Master Title GM 5105 Lot 13158 ('the land'). The proprietor is the registered proprietor of the land and had granted the developer the right to develop the land. The developer and the proprietor are related companies with common directors and shareholders.

[6] On 10 December 2012, the developer was wound up followed by the proprietor on 9 November 2006. When the developer was first wound up, the official receiver was the provisional liquidator and was replaced by Datuk Tee Guan Pin ('Datuk Tee') on 1 November 2016. Datuk Tee was the liquidator for the proprietor on its winding up. Effective 16 January 2019, Augustine TK James replaced Datuk Tee and became the liquidator for the developer and the proprietor.

[7] The respondent says it purchased 81 units of the properties built on the land including a car park, (the properties) at various points in time. Subsequently, the respondent entered into a sale and purchase agreement dated 25 February 2020 with Ascent Resources Holdings Sdn Bhd (Ascent, Ascent

SPA). Pursuant to Ascent SPA, the respondent agreed to sell and Ascent to purchase the properties for the purchase consideration of RM35m. Clause 3.1.2 Ascent SPA requires the respondent to obtain the written consent or approval of the liquidator for the sale, transfer and assignment of the properties by the respondent to Ascent within a stipulated time frame. The liquidator refused to give its endorsement and consent to the proposed sale of the properties.

[8] The respondent filed its application pursuant to s 279 of the Companies Act 1965 ('the CA 1965') to reverse the liquidator's decision not to act and, inter alia, to provide the confirmation of its legal and beneficial interests in the properties and sign the relevant consent/endorsement. The application was allowed by the HCJ while the appeal by the liquidator was allowed.

HCJ DECISION

[9] The HCJ was of the considered view that the deed of assignments/sale and purchase agreement between the respondent and the previous purchasers which was duly endorsed by the developer and/or with the proprietor's consent are sufficient documentation/evidence of the transfer of the beneficial interest to the respondent. Similarly the deed of assignments/sale and purchase agreement between the previous purchasers and the developer and/or proprietor duly endorsed or the consent are sufficient evidence of the respondent's beneficial interest of the properties. The respondent was thus a bona fide purchaser of the properties.

SUBMISSIONS OF THE APPELLANTS

[10] It was contended that the respondent was unable to show the liquidator that the full purchase price had been made for the purchase of the properties. What was relied on was the endorsements by the developer and the proprietor and the sale and purchase agreements ('SPA') with the various purchasers. These could not be evidence of payment of the consideration of the properties and were insufficient to determine the respondent was the beneficial owner. The discrepancies in the purported purchases were set out. Further, the transactions were carried out by related parties.

[11] The court should not interfere in the investigative exercise, duties and decisions of the liquidator unless there are elements of fraud, collusion and absurdity, of which there was none here. *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* [2013] 2 MLJ 629 is the clear authority on this.

[12] Upon the liquidator's appointment, inquiries were made and investigative measures taken on the affairs of the developer and the proprietor,

particularly on the properties. There was no response from the respondent who instead entered into Ascent SPA.

[13] The liquidator has a duty to be thorough in the investigation and to ensure documents are in order before providing consent. The parties executing the SPAs are the same party providing the endorsement and the undertaking in the deed of assignment such that these raises doubts. In total, there was a shortfall of RM17,918,554 payable to the proprietor.

[14] Ultimately, the liquidator is not obliged to provide consent when the respondent had not provided sufficient documents to prove ownership of the properties.

SUBMISSIONS OF THE RESPONDENT

[15] The respondent has pitched its opposition to the appeal on what it termed as the pivotal legal issue namely; whether in a sale of property without an individual title, the developer who has endorsed and consented to the assignment by the previous purchaser to the new purchaser; and agreed to deliver a valid and registrable memorandum of transfer in respect of the property in favour of the new purchaser upon the issuance of the issue document of strata title; is entitled in law to impose a burden on the new purchaser to prove that the previous purchaser has paid the purchase price to the developer/proprietor. The answer has to be in the negative.

[16] This pivotal issue relates to 75 out of the 81 units of properties. For these 75 units, the SPAs between the respondent and the previous purchasers together with the deeds of assignment containing the appellants' endorsement ('endorsement'), were provided to the liquidator. By the endorsement, the appellants had confirmed the assignment of rights, title and interest in the sale and purchase agreement to the respondent and undertake to deliver a valid and registrable memorandum of transfer in respect of the properties in favour of the respondent. This meant the appellants have recognised and confirmed the respondent to be the legal and beneficial owner of the properties.

[17] The legal effect of an absolute assignment has been set out in *CIMB Islamic Bank Bhd v Khairuddin bin Abu Hassan* [2021] 2 MLJ 155; [2021] 4 CLJ 375 where the person has absolute discretion in dealing with the property.

[18] Estoppel by deed therefore applies for which reliance was placed on *Labracon Pty Limited v Cutrich & Anor* [2013] NSWSC 97 as well as estoppel generally.

[19] The respondent has been given vacant possession and it has been in

A occupation since 2006 and has paid quit rent and assessment.

[20] The remaining six units were purchased directly by the respondent from the appellants. During the trial of Civil Suit No S6-22–96 of 2007 (Suit 2007) filed by the respondent, the director of the appellants had given
B evidence that the respondent had paid the full purchase price of the six units.

[21] The developer's former liquidator had not disputed the respondent's beneficial interest.

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[22] The liquidator had acted unreasonably in refusing consent to Ascent SPA and had made clear errors in law with respect to the legal effect of the endorsement and had taken into account irrelevant considerations. Its decision could therefore be varied by the HCJ. Reference was made to *Angkutera Sdn*
D *Bhd v Jurimba Sdn Bhd & Anor* [2016] 5 MLJ 242.

OUR DECISION

Preliminary issue: Whether respondent an aggrieved person and whether leave
E *required*

[23] The respondent's application to reverse the liquidator's decision not to give its consent is premised on s 279 of the CA 1965. The provision states as follows:

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> 279. Appeal against decision of liquidator
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> Any person aggrieved by any act or decision of the liquidator may apply to the Court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

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[24] We are satisfied the respondent is an aggrieved person within the meaning of s 279. In *Angkutera* this court said at p 249:

> [17] It is thus clear that s 279 can be applied if the appellant can show to the court that the act of the liquidator in obtaining the vesting order had wrongfully affected
H its title to the Cineplex. If the appellant succeeds, under s 279 the court may undo the transaction entered into by the liquidator.

[25] Here, the respondent is aggrieved in that the refusal of the liquidator to give its consent has indeed affected the respondent's legal and beneficial
I ownership of the properties.

[26] The objection of the appellants by way of a preliminary objection ('PO') that the respondent ought to first apply for leave of the winding up court to institute an action is met squarely by the fact that this is not an action against

the liquidator whether in his personal capacity or for breach of contract or tort or to hold him personally liable in damages. This is also not a new proceeding but a proceeding within the winding up proceeding. It is in fact an appeal against the liquidator's decision not to act in giving consent. It is clear from s 279 itself that no leave is required to, inter alia, apply to reverse the decision of the liquidator.

[27] In this regard, the cases referred by the appellant that leave was required, were in relation to a claim against the company in liquidation for breach of contract and fraud (*North Malaya Engineers Trading Co Sdn Bhd v Aik Aik Holdings* [2014] 4 CLJ 629) and civil action for damages against the liquidator personally (*Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 ML J 204, *Tee Siew Kai (liquidators for Merger Acceptance Sdn Bhd (in liquidation)) v Machang Indah Development Sdn Bhd (in liquidation) (previously known as Rakyat Corp Sdn Bhd)* [2020] 6 MLJ 168; [2020] 4 CLJ 841 and *Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor* [2007] 3 MLJ 571; [2007] 7 CLJ 516).

[28] In any event, it was eventually conceded by the appellants' counsel that the HCJ was correct on the PO that no leave was required.

Liquidator's refusal to give consent

[29] The application is to reverse the liquidator's refusal to act to give its consent. It has been made clear in *Wong Sin Fan* that courts should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation. This was said at p 639:

> Based on the above principles of law, we are of the view that the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way.

[30] Therefore, the issue really is whether the decision of the liquidator is so unreasonable and absurd that no reasonable person would have acted in that way, thereby warranting the court to interfere with the decision.

[31] In *Angkutera*, it was said at pp 249–250:

> [18] In *Chin Ah Keow @ Chin Lai Sitt v Anggun Pintas Sdn Bhd & Ors* [2005] 4 MLJ 747 at p 756, the court held that the function of the court under s 279 of Act 125 was to hear the matter as a strict appeal from the decision of the liquidator — The powers given to the court were to consider whether the act or decision of the liquidator was right or otherwise. To do this the court must have regard to the circumstances which were before the liquidator at the time of his act or decision and not to circumstances subsequently arising. The court in *Chin Ah Keow*, had

A followed the test applied in *R Edennote Ltd; Tottenham Hotspur plc and others v Ryman and another* [1995] 2 BCLC 248 where it was held that the court could only interfere with the exercise of a liquidator's decision to sell the assets of an insolvent company in very exceptional circumstances and would not do so unless it could be shown that he had acted utterly unreasonably or, though acting in good faith took B into account considerations which he ought not to have taken into account or failed to take into considerations which he ought to have taken into account.

[32] Earlier on, this court in *Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor* [2007] 2 MLJ 12 had similarly stated:

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> [16] The court will not interfere with the decision simply because its opinion might differ from that of the liquidator. Generally, the court will recognize that the discretion has been vested by statute in the liquidator and will not interfere unless it is shown that he did not address himself to the correct questions or has made errors of law (see *Avon Downs Pte Ltd v FC of T* (1949) 78 CLR 353; *Re Mineral Securities* D *Ltd* [1973] 2 NSWLR 207) or has not exercised his discretion bona fide or has acted in a way in which no reasonable liquidator would have acted (see *Leon v York-O-Matic* [1966] 1 WLR 1450) or has taken into account entirely irrelevant considerations (see *Yeomans v Walker & Anor* [1986] 10 ACLR 753) or when there is fraud.

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[33] Thus, the principles are that the court is slow to interfere in the decision of a liquidator but will interfere if the decision is unreasonable, absurd, or did not take into account relevant considerations or conversely or is an error in law. The court will not interfere simply because its opinion might differ from that F of the liquidator.

No consideration by HCJ on the decision of liquidator

G **[34]** With the above principles in mind, we find it most telling that the HCJ in his judgment did not consider whether the decision of the liquidator was one that was reasonable or absurd, that is to say, not following the principles laid down in *Wong Sin Fan*. Instead, the HCJ had substituted his own finding and this is evident from para 17 of the judgment that 'I am satisfied that the H applicant (the respondent in this appeal) is a bona fide purchaser for value of the 81 properties'. The HCJ had thus made an error in fact and in law.

Whether decision of liquidator unreasonable or absurd

I **[35]** It therefore behoves upon this court to now consider whether the decision of the liquidator was one that was unreasonable, absurd or falling into any of those categories laid down in the cases referred to earlier. To us, this is the central issue where we would need to consider the circumstances under which the liquidator did not give consent, in the course of it, the evidence and

documents relied on by the respondent to support its pivotal legal issue, will be considered.

The 81 units of properties

[36] At the heart of the problem is the 81 units of properties that the respondent says it has acquired beneficial and legal ownership over.

[37] Although the units were described differently where the respondent refers to them by units such as the six units, the 51 units and so on, and the appellants by way of Schedule A to D, these were only to show how the properties were eventually purchased by the respondent. There was no dispute it referred to the same 81 units.

The six units

[38] For the six units of shop lots (which correspond to Schedule A) namely Units G-11, G-12, 1-11, 1-12, 1-13 and 1-14, these were all purchased directly by the respondent from the appellants. The total purchase price was RM2.8m.

The 51 units

[39] The 51 units (which correspond to Schedule B) were transferred from the appellants to Megatalent sometime in 1997 to 1999 and from Megatalent to the respondent in 2006. The original purchaser is therefore Megatalent and the second purchaser the respondent.

[40] Six units were charged to Standard Chartered Bank Bhd (StanChart) and nine to PBB. The appellants contend there is a differential sum of RM531,000 and RM1.675m for which there is no proof of payment. It says for the remaining 36 units, the total purchase price was RM9.540m. These units are set out in pp 25–28 of the appellants' submission dated 13 January 2021. The appellants contend the money not proved by the respondent is RM11.746m.

The seven units

[41] The seven units (which correspond to Schedule C) were sold by the appellant to individual purchasers who are related parties to the developer, proprietor and Megatalent. These units are A-1-G, A1-1-F, A-2-G, A2-1F, A-3-G, A1-1(B) and the car park. In particular the carpark was sold to Leong Choong Shin, who is director of the developer, proprietor and Megatalent for RM950,000. It is the appellant's contention the total sum of RM1,446,119 has not been proved to be paid.

A The 17 units

[42] The 17 units (which correspond to Schedule D) were sold by the appellant to other individual purchasers. These units are set out in pp 39–41 of the appellants' submission dated 13 January 2021. For four units (G-13 to 15 and A-15-1(C)) there was a difference between the purchase price and the loan where an amount of RM429,000 is said to be not proved. The other problems are detailed in pp 45–46 of the appellants' submission along with the relevant enclosures and the total amount not proved as paid is RM2,323,554.

C THE DOCUMENTS

[43] It is not disputed the SPAs for the purchase of all the units by the respondent were submitted to the liquidator. For the six units, the SPAs were in exh 'SA9', encl 40/326-349, the 51 units in exh 'SA6', encl 25/47 to encl 34/323, the four units (part of Schedule C) in exh 'SA8', encl 34/329 to encl 36/435, the 19 units in exh 'SA9', encl 36/6 to encl 40/325 and the carpark in exh 'SA11', encl 40/350-389. Except for the six units, the DAs and the endorsement of consent and the developer's and the proprietor's consent were also in the aforesaid exhibits. The relevant loan documents and deed of receipt and reassignment were also produced.

The 75 units

[44] The 75 units related to those where the respondent purchased from previous purchasers. We find that the documents referred to above cannot possibly be sufficient to prove beneficial or legal ownership of the respondent. This is because the respondent had not proved the payment of the purchase price or the 10% deposit and in the loan cases, the differential amount. These are required given the circumstances of the transactions as set out below.

[45] We note the 51 units were purchased from Megatalent which in turn purchased from the appellants. Megatalent and the appellants share common directors and shareholders as the developer and the proprietor in Leong Choong Shin, Leong Chui Mei and Leong Chung Wah (collectively referred to as 'the Leongs'). Refer to encl 104/272, 274, 279 and 280 and as per the Company search in exh 'AJ-6' averred in paragraph 38 of the liquidator's affidavit (encl 104/116–117). These were related transactions. The seven units sold by the appellants to the individual purchasers and ultimately to the respondent were also common directors and shareholders of the developer, the proprietor and Megatalent. These too were related transactions. For the 17 units there were instances where the loan amount did not match the purchase price.

[46] These are where proof of payment of purchase price or deposit or differential amount come in. A

[47] The respondent cannot rely on the endorsement of consent (an example of which is in encl 35/326). It is not disputed this endorsement was from the developer and the proprietor and provides as follows: B

> We, KEMACAHAYA DEVELOPMENT SDN BHD (296751-P) and SYARIKAT KEMACAHAYA SDN BHD (141317-W) a company incorporated in Malaysia and having its registered address at C-15-1, Level 15, Megan Phileo Avenue, 12, Jalan Yap Kwan Seng 50450 Kuala Lumpur, being the developer and proprietor respectively of the Property do hereby acknowledge that on the 13th day of February, 2008 the within written Assignment was intimidated to us by the delivery of a true copy thereof and the same has been noted in our record. C
>
> We further undertake to deliver the issue document of the strata title to the said property to the Assignee upon issuance of the same together with a valid and registrable memorandum of transfer in favour of the assignee. D

[48] Along with the endorsement of consent was also the developer and proprietor's consent (an example of which is in encl 104/364) which acknowledged the DA and even went on to state as follows: E

> Developer's and Proprietor's consent
>
> ...
>
> We confirm that the purchase price to the Property as stated in the Principal Sale Agreement has been paid in full and the Assignor has performed and complied with all the terms and conditions of the Principal Sale Agreement and we hereby consent to this Deed of Assignment and agree and undertake to cause to deliver a duly executed, valid and registrable but unstamped Memorandum of Transfer in respect of the Property in favour of the Assignee together with the issue document of title for the Property free from all encumbrances forthwith upon the issue document of strata title becoming available. F G

[49] Despite this, we note that in the developer and proprietor's consent, the signatory for the developer would be one of the Leongs and for the proprietor another of the Leongs. Hence in the aforesaid p 364, Leong Chung Wah signed for the developer and Leong Choong Shin for the proprietor. We noted earlier their relationship to Megatalent. These were interested parties. H

[50] We find that due to the nature of these related transactions as set out above and the manner in which the acquisition and eventual disposal was carried out, the liquidator's action in requiring more than the documents already provided, was reasonable, not absurd and not an error in law, This was the proof of payment of purchase price, or the deposit paid and the differential amounts, I

[51] We are certainly mindful of the effect of an absolute assignment as provided in s 4(3) of the Civil Law Act 1956 and stated in *Khairuddin.* The aforesaid s 4(3) states as follows:

> 4. Administration of insolvent estates, and winding up of companies
>
> ...
>
> (3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[52] *Khairudin* too had occasion to say the following at p 171 (MLJ); 388 (CLJ):

> [63] It is also most important to note that the property is absolutely assigned to the appellant. Meaning that the appellant has absolute discretion in dealing with the property as it deems necessary. The property basically belongs to the appellant until full payment is made by the respondent for the facility he obtained from the former.

[53] We do not dispute the principles enunciated in *Khairuddin* but that case did not involve related or interested parties but the bank and its customer and a default arising therefrom where the issue was whether the bank had a duty to inform about the proclamation of sale.

[54] It was urged upon us that a decision against the respondent would have a far-reaching impact on established conveyancing practice. Reference was made to *Conveyancing in Malaysian Law and Practice,* Sweet & Maxwell Asia 2010 by Ng Kok Wai at pp 46–47:

> 1.13 To carry out the conveyance of beneficial interest in a property without individual title, the mechanism used is that of an assignment by the vendor to the purchaser of all his beneficial rights and interests comprised in the principal SPA between the developer and the vendor. If the vendor is not the original purchaser, he would have earlier accepted an assignment of the original purchaser's rights and interests in the principal SPA.

[55] We do not think conveyancing practice will turn on its head, as it were. All we are saying is that in the light of the factual matrix of the transactions leading to the 75 units as was outlined above, the liquidator is entitled to call for documents on proof of payment of purchase price or the deposit and the

differential amount. There has been no complete documentation provided such that the liquidator is not obliged to provide his consent.

The six units

[56] The six units stand on an entirely different footing. It is not disputed the respondent purchased them directly from the appellants. The evidence of the appellants' director in Suit 2007 that the purchase price was paid, is relied on. The issue was one Pasupathy's ownership over the six units as opposed to the respondent (previously known as Masterskill). At the High Court, the respondent claimed they were the rightful owners of the six units and judgment was given in their favour. On Pasupathy's appeal reported in *Pasupathy a/l Kanagasaby v Masterskill (M) Sdn Bhd & Anor and another appeal* [2017] MLJU 129; [2017] 1 LNS 106, this court did not recognise either party's beneficial ownership. It was said as follows:

> [38] Accordingly, we opine that the learned judge was wrong in sustaining the claim of Masterskill on a unpleaded cause of action.
>
> [48] ... Be that as it may and in view of our finding that Pasupathy is also not the owner of the six shop lots ...
>
> [51] ... 1. Pasupathy's appeal in respect of Suit 96 in which the learned judge sustained Masterskill's claim is allowed.

Therefore the six units are subject to the same requirement of proof of payment of the purchase price.

ESTOPPEL

[57] Estoppel by deed and estoppel generally, will not apply under the facts of this case.

LIQUIDATOR HAS NO BETTER RIGHT

[58] It was also submitted that the liquidator has no better right than the appellants. Reference was made to *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201 where it was said at p 5 of 8:

> Assuming KCL was not in liquidation, it is incumbent upon KCL to redeem it before the R and M could be compelled to hand over the movable asset to KCL. Thus, turning to the present case, why should the liquidator's right be greater than that of KCL? In the light of our finding in para 13 herein, the R and M could not be compelled to hand over the movable asset to the liquidator. KCL is only entitled to the equity of redemption and it follows, therefore, that the liquidator is only entitled to exercise his right of redemption.

[59] However that case dealt with the rights of a liquidator and a receiver and manager where it was stated in the above passage 'why should the liquidator's right be greater than that of KCL ... the R and M could not be compelled to hand over the movable asset to the liquidator'.

TIER OF TRANSACTION

[60] A distinction was attempted to be drawn that related party transactions only concerns first-tier transactions and not second-tier transactions. However, it is not the level of tier but that the transactions are related. It was also said that related party transactions are not prohibited. This was precisely what was stated in *Abric Project Management Sdn Bhd* at p 591 (MLJ); 546 (CLJ), para 81. Be that as it may, as we noted earlier, it is how these transactions set in motion the manner of acquisition and eventual disposal, that are relevant.

VERIFICATION EXERCISE

[61] We pause to note that the liquidator had in 2006 started to make enquiries and took investigative measures on the affairs of the developer and the proprietor, inter alia, on the properties.

[62] As noted earlier, the current liquidator took over from Datuk Tee on 16 January 2019. It was stated in para 83 of affidavit in reply dated 4 March 2021 (liquidator's AIR) that Datuk Tee had not commenced any verification process of the units said to be owned by the respondent. The liquidator got down to work and started his verification process on 3 May 2019 by issuing a notice to all purchasers of the properties to provide their historical documentation which also saw the exchange of correspondence between solicitors. Refer to paras 84–89 of Liquidator's AIR (encl 104/144–149). For instance, by letter dated 5 June 2020 (encl 49/22–24), the liquidator informed Minda Global Berhad (Minda), the respondent's parent company, that 'the following information/documents have not been submitted' and another letter dated 25 July 2020 (encl 49/303–304), that 'the developer had failed to provide a comprehensive register of purchaser and their documentations. We had conducting a verification exercise There was then a letter dated 6 August 2020 from the liquidator's solicitor to the respondent's solicitor (encl 107/16–20) as to the concerns on the transactions pertaining to the 81 units.

[63] In *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 the Federal Court looked at the standards expected of a liquidator in relation to the sale of assets. It was observed at p 735 and with reference to some authorities that 'The role of a liquidator includes carrying out many administrative and investigative tasks'.

[64] It cannot be seriously disputed that the liquidator has the power to investigate and ascertain whether the acts of the directors of the appellants were correct and proper. This is more so where fraud, collusion or miscarriage of justice is involved as the liquidator is a trustee in bankruptcy for the creditors.

[65] In *Re Shruth Ltd; International Brands USA Inc v Goldstein and another; International Brands USA Inc and another v Haswell and others* [2006] 1 BCLC 294 it was stated at p 303:

> [31] It was common ground that there is a well-established principle that a liquidator or a trustee in bankruptcy has the power to inquire into the consideration for a judgment debt when adjudicating upon a proof of debt. The rationale for this is that otherwise a debtor might, by default, suffer judgment without any, or any adequate, consideration and thereby deprive his just creditors of their rights: see *Ex p Kibble, Re Onslow* (1875) LR 10 Ch App 373 and *Re Lennox, ex p Lennox* (1885) 16 QBD 315. However, the judgment or order is conclusive, unless the consideration (ie the cause of action or the substance of the claim) can be questioned: see *Re Beauchamp* [1904] 1 KB 572. In practice this means that the validity of the judgment debt will only be inquired into where there is evidence of fraud, collusion, or some other miscarriage of justice.

[66] The same principle may also be gleaned from *Re Menastar Finance Ltd (in liq), Menastar Ltd v Simon* [2003] 1 BCLC 338 at p 339 as follows:

> Held — (1) It was an established principle that, on making a winding-up or bankruptcy order, the court was not precluded in appropriate circumstances from looking behind the judgment on which a creditor's proof was based to ensure that the debt was truly due. In this respect the liquidator's power was no different from that of the court itself, since the liquidator, in deciding whether to accept or reject a creditor's proof in whole or in part, was acting in a quasi-judicial capacity. His statutory duty was to ensure that the company's property was collected in and applied in satisfaction of its liabilities pari passu among its just and proper creditors. In deciding whether to go behind the judgment debt, and, if so, in appraising the validity of the creditor's claim, neither the court nor the liquidator was limited to the evidence that was before the court when it gave its judgment. The rationale behind the principle that the liquidator might look behind a judgment was that the duty of the liquidator was to ensure that the assets of the insolvent company were distributed amongst those who were justly, legally and properly creditors.

[67] Although these cases deal with the power of a liquidator to go behind a judgment, the principle essentially is that the liquidator can investigate as was done here, by the verification process and call for historical documentation to establish ownership.

A NO DISPUTE BY THE PREVIOUS LIQUIDATOR

[68] The respondent had submitted that Datuk Tee, the developer's previous liquidator had not disputed its beneficial interest over the units. Datuk Tee had lodged five liquidator's accounts of receipts and payments and statements in the position of winding-up. In encl 48/280–299, exh 'SA29') for the amount of assets, liabilities or debts owing to the developer as at the date of commencement of the winding-up, have all been listed as 'Nil'. It need only be said that Datuk Tee did not carry out any verification exercise, as was done by the liquidator.

PAYMENT OF QUIT RENT, ETC

[69] The payment of quit rent and assessment since 2006, and payment for connection of water supply, without more, cannot possibly support the claim to beneficial and legal ownership of the units. In *Tetuan Tokoyaki Property Sdn Bhd v Sam Kok Sang & Tham Sow Seng & Ors* [2001] 1 MLJ 585; [2001] 4 CLJ 97 it was said at pp 599 (MLJ); 112–113 (CLJ):

> As for the contention by the plaintiffs' counsel that mere payment of assessment for the first defendant's house does not impliedly give him the consent or permission to live on the said lot because ss 127 and 163(1) of the Local Government Act 1976 empowers the local authority to impose charges, this court agrees that the charges of assessment is imposed by the local authority because there is a building constructed within the jurisdiction of the Local Authority and in this case, the Majlis Perbandaran Taiping and that fact alone being payment of assessment does not grant the first defendant permission or consent to continue to live on the said lot. The Local Authority is not duty bound to inquire whether the occupiers of the building on the said lot is the registered owner, the tenant or the licensee or the tenant holding over. As so long as the building is occupied, the Local Authority being the Majlis Perbandaran is entitled to collect payment for assessment under the Local Government Act 1976.

AMOUNT NOT PAID

[70] The amount not proved as paid on the 81 units (Schedule A to Schedule D), is a total of RM17,918,554 comprising RM2.8m + RM11.746m + RM 1,303,119 + RM2,069,435.

LIQUIDATOR ACTED REASONABLY

[71] We conclude the way we began our decision by reiterating the time honoured principles laid down in *Wong Sin Fan* which is to be slow to interfere with any act or decision of the liquidator in the discharge of his duty. We have considered the circumstances under which the liquidator refused consent for

the sale of the 81 units to Ascent, and find the decision to be reasonable, not absurd and not in error of law.

CONCLUSION

[72] In the premises, we find merits in both appeals. We allow the appeals and set aside the decision of the HCJ. We allow costs of RM20,000 here and below, for each appeal, subject to allocatur.

Appeal allowed, High Court's decision set aside.

Reported by Ashok Kumar